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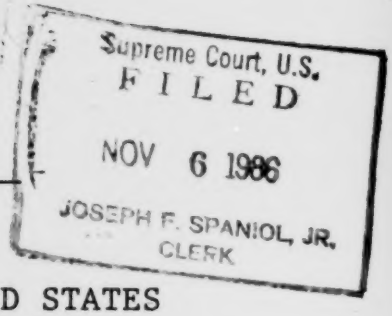

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF FLORIDA

Petitioner,

vs.

JEFFREY NEASE a/k/a MICHAEL COLWELL
a/k/a LOUIS POYNTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT.

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QUESTIONS PRESENTED

I

WHETHER THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY HELD THAT DEFENDANT'S RUNNING AWAY WHEN THE SEARCH OF HIS LUGGAGE WAS ABOUT TO BEGIN WAS A WITHDRAWAL OF THE CONSENT TO SEARCH AS OPPOSED TO AN ABANDONMENT OF HIS LUGGAGE?

II

WHETHER WHEN A TRAVELER IS SUBJECTED TO A LAWFUL CUSTODIAL ARREST AT A CONGESTED AIRPORT TERMINAL CONCOURSE, DOES THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO HIS LAWFUL ARREST INCLUDE THE LUGGAGE WHICH HAS BEEN CONTEMPORANEOUSLY SECURED BY THE OFFICERS?

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OPINIONS BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth District, was filed on March 5, 1986; that court denied rehearing on April 9, 1986. Nease v. State, 484 So. 2d 67 (Fla. 4th DCA 1986).

GROUND UPON WHICH JURISDICTION IS INVOKED

The opinion of the District Court of Appeal of the State of Florida, Fourth District was filed on March 5, 1986, affirming the conviction for possession of methaqualone, but reversing the order denying the motion to suppress and reversing the judgment of conviction for trafficking in cocaine (A. 1-1D). That court denied a timely motion for rehearing on April 9, 1986 (A 12). In an unreported order, the Supreme Court of Florida denied the State's petition for discretionary review on September 10,

1986 (A. 13). Thus, the opinion of the Fourth District Court of Appeal is the decision of the highest court in which the decision could be had in this case. See Williams v. Florida, 399 U.S. 78, 80 n.5 (1970).

This petition is timely filed within 60 days of the denial of review by the Florida Supreme Court, and this Court's jurisdiction is invoked under 28 U.S.C. §1257(3). [By order of September 26, 1986, the Florida Supreme Court has stayed proceedings in the State Courts pending review by this Honorable Court (A15).]

FEDERAL CONSTITUTIONAL PROVISION INVOKED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

> warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendant[1/] was charged with trafficking in cocaine in an amount in excess of four hundred (400) grams and possession of methaqualone. On appeal to the Fourth District Court of Appeal, defendant assigned as error the denial of his Motion to Suppress the cocaine and methaqualone. On December 7, 1983, the Fourth District Court of Appeal issued its first opinion reversing the judgment and sentence of the trial court. Nease v. State, 442 So.2d 325 (Fla. 4th DCA 1983), pet.for review denied, 453 So.2d 45 (Fla. 1984). Petitioner sought review by this Honorable Court; and on

1/ Throughout this petition, Petitioner will be called "the state," and Respondent will be called "defendant."

March 25, 1985, this Court granted the State's petition for certiorari, vacated the judgment, and remanded the case to the District Court of Appeal of Florida, Fourth District, for further consideration in light of Florida v. Rodriguez, 469 U.S. ___, 105 S.Ct. 308, 83 L.Ed.2d 165(1984). Florida v. Nease, ___U.S.___, 105 S.Ct. 1835, 85 L.Ed.2d 136 (1985).

On remand, the Fourth District Court of Appeal of Florida withdrew its earlier opinion, affirmed the defendant's conviction for possession of methaqualone, and reversed the order denying the suppression of the cocaine. Nease v. State, 484 So.2d 67 (Fla. 4th DCA 1986). Motion for Rehearing was denied April 9, 1986. It is this second decision of the Florida District Court of Appeal which Petitioner seeks to have reviewed by this Honorable Court.

The facts pertinent to this appeal as set forth in the opinion of the Fourth District Court of Appeal are as follows:

Nease aroused the suspicion of two narcotics agents at Fort Lauderdale Airport because his appearance and behavior were consistent with a drug courier's profile. The agents had observed Nease at the Delta Airlines ticket counter purchasing a one way ticket to Cincinnati with cash. He appeared nervous, shifting his weight from foot to foot and constantly looking around. They approached him, identified themselves as officers, and asked to see his tickets and identification. Nease complied. This revealed that the names on the ticket and the license did not match. Noting this discrepancy, the officers identified themselves once more, this time as narcotics agents, and asked if they could search his bags.

Nease initially consented. The agents also returned the ticket and identification to Nease.

A third agent removed Nease's luggage from the airline conveyor belt, and the agents and Nease walked toward the room where the search was to take place. When they reached the door, however, Nease did not enter. Instead, he turned around and ran toward his departure gate. Two agents chased and tackled Nease while the third agent remained behind and searched the contents of his suitcase. This search revealed cocaine. A search of his person after his arrest revealed a small quantity of methaqualone.

The Florida Fourth District Court of Appeal found the initial encounter between Defendant and the agents to be a consentual encounter which Defendant was free to ignore, and not of the sort that

triggers Fourth Amendment protections, citing Terry v. Ohio, 392 U.S. 1 (1968). The Fourth Distirct further found that Defendant agreed to the search of his luggage, but that before this could be accomplished Defendant ran away, leaving his luggage behind.

The Fourth District then held that Defendant's running constituted a non-verbal withdrawal of consent to search his luggage. However, because a founded suspicion had developed at that point, the agents no longer needed to rely on Nease's consent to detain him under a Terry stop. Consequently, the agents were justified in pursuing Nease for further questioning. The struggle that followed when they caught him was sufficient to justify his arrest for interfering with an officer in the performance of his legal duty, pursuant

§843.02, Florida Statutes (1985). The Fourth District then concluded that since Defendant was under arrest at this time, the methaqualone found in his possession was admissible because it was obtained in a search pursuant to a lawful arrest.

The Fourth District, however, held the search of the luggage was an improper warrantless search which led to evidence obtained in violation of his Fourth Amendment rights stating:

"Because we conclude that by running Nease effectively withdrew his consent to a search of his luggage, a warrantless search of those bags was improper. The Fourth Amendment protects an owner's expectation of privacy in the contents of a closed container. United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). In Chadwick, the court concluded that a warrant was nec-

essary to search a locked footlocker seized contemporaneously with the defendant's arrest, despite the fact that the police had probable cause to believe it contained marijuana. The court stated:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer incident of the arrest.

433 U.S. at 15, 97 S.Ct. at 2485, 53 L. L.Ed.2d at 51."
(A 9-10).

The State seeks to invoke the discretionary jurisdiction of this Court to review the decision of the State court which totally ignores the search incident to lawful arrest exception to the warrant requirement as interpreted by

this Court in Chimel v. California, 395 U.S. 752 (1969), and New York v. Belton, 453 U.S. 454 (1981) and erroneously interpreting the structures of the Fourth Amendment as interpreted by this Court in United States v. Chadwick, 433 U.S. 1 (1977). The decision in controversy concerns an eminently important and unsettled area of law.

REASONS FOR GRANTING THE WRIT

The Florida Fourth District Court of Appeal concluded that under United States v. Chadwick, 433 U.S. 1 (1977), the agents needed a warrant to search Defendant's luggage notwithstanding the fact that the luggage was searched at the airport contemporaneously with the agents' pursuit and arrest of Defendant. The State submits that the lower court has misread United States v. Chadwick, supra, and that this misinterpertation

improperly curtails police investigations and contravenes the public interest involved in the suppression of illegal transactions in drugs or of any other serious crime.

It is true that this Court in United States v. Chadwick, 433 U.S. at 15, held that a warrant was necessary to search a locked footlocker once the footlocker has been reduced to the exclusive control of the police. However, Chadwick did not involve a search incident to the arrest. This Court in Chadwick also pointed out:

> Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency.
> Id. at 15.

I

This Court in Abel v. United States, 326 U.S. 217, 241 (1960) declared that the Government's warrantless seizure of abandoned property did not violate the Fourth Amendment. The Federal circuit courts since Abel have said that the existence of police pursuit or investigation at the time of abandonment does not of itself render the abandonment involuntary. United States v. Jones, 707 F.2d 1169 (10th Cir.), cert. denied 464 U.S. 859 (1983); United States v. Colbert, 474 F.2d 174, 176(5th Cir. 1973); see generally, e.g., United States v. Berd, 634 F.2d 979, 987 (5th Cir. 1981); United States v. Canady, 615 F.2d 694 (5th Cir.), cert. denied, 449 U.S. 862 (1980); United States v. Williams, 569 F.2d 823 (5th Cir.1978); United States v. D'Avanzo, 443 F.2d 1224 (2d Cir.),

cert. denied 404 U.S. 850, (1971).

The facts herein are clear; Defendent consented to the search of his luggage. However, upon realizing apprehension was imminent as a result of the search, he ran in an effort to disassociate himself from the luggage. The State submits that these facts support the theory that Defendant abandoned his luggage when he ran away from the agents, and, hence, he thereafter had no legitimate subjective expectation of privacy in the bag and the search thereof was thus lawful. United States v. Collis, 766 F.2d 219 (6th Cir.), cert. denied __U.S. __,106 S.Ct. 150, 88 L.Ed.2d 124 (1985). See also, United States v. Jones, supra; United States v. Berd, supra.

The Florida Courts likewise have held that when a police officer observes a person drop an article to avoid any

connection with the item once he observes the police coming to question him, and the police officer stops to pick up the item, and upon finding contraband therein arrests the individual, such arrest is legal on the rule that the defendant's initial actions constituted abandonment of the contraband in a place in which he clearly had no reasonable expectation of privacy. See, e.g., Maxwell v. State, 443 So.2d 967 (Fla. 1983); State v. Nittolo, 317 So.2d 748 (Fla. 1975); State v. Davis, 415 So.2d 82(Fla. 4th DCA 1982); State v. Brown, 412 So.2d 24 (Fla. 4th DCA), Pet. for rev. denied, 419 So.2d 1195 (Fla. 1982); State v. Milligan, 411 So.2d 946 (Fla. 4th DCA 1984); State v. Lawson, 394 So.2d 1139 (Fla. 4th DCA 1981); State v. Dunlap, 392 So.2d 1366 (Fla.3d DCA 1981); Sharpe v. State, 370 So.2d 42 (Fla. 1st DCA

1979), cert. denied 381 So.2d 769(Fla.), cert. denied 449 U.S. 821 (1980). But see, Jacobson v. State, 476 So.2d 1282 (Fla. 1985). The State thus submits that the Fourth District misapplied the law of abandonment to the search under the particular facts of this case.

II

The State will now proceed to its main argument, i.e., even if this Court does not address the abandonment issue, the search of the luggage was a lawful search incident to the arrest, and the trial court judgment should have been affirmed under the authority of New York v. Belton, supra.

Approval of a warrantless search incident to a lawful arrest seems first to have been articulated by this Court in 1914 in dictim in Weeks v. United

States, 232 U.S. 383(1914). However, it is well-settled now that a warrantless search conducted incident to a lawful arrest is a traditional and essential exception to the warrant requirement of the Fourth Amendment. United States v. Robinson, 414 U.S. 218 (1973). The search incident to arrest exception embraces warrantless searches of both the arrestee's person and the area within the arrestee's immediate control. Chimel v. California, 395 U.S. 752(1969). In articluating the legitimate scope of such searches, this Court in Chimel stated at 763:-

> "[I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a

> like rule. . . . There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'-construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence."

Subsequently in 1981, this Court set the constitutionally permissible scope of a search incident to arrest in New York v. Belton, 453 U.S. 454 (1981), and held at 460 that:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passanger compartment of the automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within

his reach.[4] United States v. Robinson, supra; Draper v. United States, 358 US 307. Such a container may, of course be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. Thus, while the court in Chimel held that the police could not search all the drawers in an arrestee's house simply because the police had arrested him at home, the Court noted that drawers within an arrestee's reach could be searched because of the danger their contents might pose to the police. 395 US, at 763, 23 L Ed 2d 685, 89 S Ct 2034.

---

[4] "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passanger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

> It is true, of course, that these containers will sometimes be such that they could hold neither a weapon not evidence of the criminal conduct for which the suspect was arrested. However, in United States v. Robinson, the Court rejected the argument that such a container--there a "crumpled up cigarette package"--located during a search of Robinson incident to his arrest could not be searched: "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment that intrusion being lawful, a search incident to the arrest requires no additinal jurisdiction." 414 US, at 235, 38 L Ed 2d 427, 94 S Ct 467, 66 Ohio Ops 2d 202.
> [Emphasis added.](Footnotes 2 and 3 omitted)

Application of the above authorities to the instant case compels the conclusion that the search in question

was reasonable under the structures of the Fourth Amendment, and that the teachings of Chadwick do not mandate a different result. Despite a superficial similarity between the factual settings (i.e., a search of the contents of luggage), substantial differences become apparant upon an objective examination of the facts controlling Chadwick and those governing the present case. These differences so distinguish Chadwick as to render its application inapposite to the factual circumstances presented here, and a fortiori dictates that Chadwick's legal rationale does not control the resolution of this case.

In Chadwick, the object seized was a cumbersome, two hundred pound, double-locked footlocker, which obviously could be neither quickly opened nor rapidly

removed by the defendants. The foot-locker was not opened at the train station, but rather, more than one hour following the arrest, at the police station, when the defendant was already incarcerated.

The factual circumstances governing the search in this case are in marked contrast. The luggage in this case consisted of a portable suitcase which was quite capable of being snatched by the Defendant, or a waiting accomplice of the Defendant, in order to destroy the evidence, or to gain access to a weapon. Unlike the search in Chadwick, the search in this case was undertaken contemporaneously with the Defendant's arrest. This immediate search served two purposes; the traditional one of protecting the officers and the evidence

under Chimel, and secondly that should the agents have failed to find any incriminating evidence, Defendant could have been immediately released with a citation for the interference with the officers in the performance of their legal duty under §843.02,Fla.Stat.(1985), while verifying or dispelling their suspicions in a manner that did not exceed the limits of an investigative detention. Florida v. Royer, __U.S.__, 103 S.Ct.__, 75 L.Ed.2d 229,239 (1983). Certainly, the fact that the arrest was effected in public, in the middle of a congested airport, supports the agents' judgment to undertake an immediate search of the luggage. Accordingly, the search which was neither remote in time or place from the arrest, since the police had probable cause to effect the arrest, justi-

fiable suspicion for the stop, and exigent circumstances were present, the warrantless search of the contents of the luggage was justified as a search incident to arrest.

As this Court stated in Belton, n.5, at 461, it seems to have been the theory of the [Fourth District] that the search and seizure in the present case could not have been incident to [Defendant's] arrest, because [the agent] by the very act of searching [the luggage] and seizing the contents . . ., had gained "exclusive control" of them. But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his "exclusive

control."

Under the authority of New York v. Belton, the State urges this court to conclude that the search challenged here was justified as incident to a lawful arrest, and was therefore, reasonable within the meaning of the Fourth Amendment.

CONCLUSION

It must be remembered that the Fourth Amendment is meant to protect against unreasonable searches and seizures. The State has maintained all along that the actions of the police did comport with the ultimate test of reasonableness under the Fourth Amendment and that the Fourth District analysis of the situation and finding that the police acted in contravention of the Fourth Amendment is in error. The State respectfuly submits

that this case involves a substantial federal question which should be resolved by this Court, and respectfully requests that this Court grant its petition for writ of certiorari to the District Court of Appeal of the State of Flroida, Fourth District.

Respectfully submitted,

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A P P E N D I X

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IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1986

JEFFREY NEASE a/k/a MICHAEL COLWELL a/k/a LOUIS POYNTER,

Appellant,

v. CASE 82-2164

STATE OF FLORIDA,

Appellee.

Opinion filed March 5, 1986

Appeal from the Circuit Court for Broward County; Patricia Cocalis, Judge.

Steven J. Finta, Fort Lauderdale, for appellant.

Jim Smith, Attorney General, Tallahassee, and Marlyn J. Altman, Assistant Attorney General, West Palm Beach, for appellee.

ON REMAND

PER CURIAM.

Appellant was tried and convicted in 1982 for trafficking in cocaine and for possession of methaqualone. We reversed the conviction holding that the trial court erred when it denied the motion to suppress. Nease v. State, 442 So.2d 325

(Fla. 4th DCA 1983), petition for review denied, 453 So.2d 45 (Fla. 1984). The United States Supreme Court subsequently granted the state's petition for certiorari and remanded the cause to this court for reconsideration in the light of Florida v. Rodriguez, ___U.S.___, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984). Pursuant to the Supreme Court's mandate, we withdraw our earlier opinion and affirm the defendant's conviction for possession, but reverse the order denying the suppression of the cocaine.

Nease aroused the suspicion of two narcotics agents at Fort Lauderdale Airport because his appearance and behavior were consistent with a drug courier's profile. The agents had observed Nease at the Delta Airlines ticket counter purchasing a one way ticket to Cincinnati with case. He appeared nervous, shifting

his weight from foot to foot and constantly looking around. They approached him, identified themselves as officers, and asked to see his tickets and identification. Nease complied. This revealed that the names on the ticket and the license did not match. Noting this discrepancy, the officers identified themselves once more, this time as narcotics agents, and asked if they could search his bags. Nease initially consented. The agents also returned the ticket and identification to Nease.

A third agent removed Nease's luggage from the airline conveyor belt, and the agents and Nease walked toward the room where the search was to take place. When they reached the door, however, Nease did not enter. Instead, he turned around and ran toward his departure gate.

Two agents chased and tackled Nease while the third agent remained behind and searched the contents of his suitcase. This search revealed cocaine. A search of his person after his arrest revealed a small quantity of methaqualone.

The initial encounter between Nease and the agents was not of the sort that triggers Fourth Amendment protections. United States v. Mendenhall, 446 U.S. 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Rather, it was merely a consensual encounter which Nease was free to ignore. Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). As noted by Justice White in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), "[t]here is nothing in the constitution which prevents a policeman from addressing questions to anyone

on the streets." 392 U.S. at 34, 88 S. Ct. at 1886, 20 L.Ed.2d at 913. Similarly, a seizure did not occur when the agents asked Nease if they could inspect his ticket. It is not until the situation becomes such that a reasonable person would conclude that he is no longer free to leave that a stop has escalated into an illegal detention under Terry. See Mendenhall, 446 U.S. at 554, 100 S.Ct. at 1877, 64 L.Ed.2d at 509.

In order to detain someone even momentarily, police must have an articulable suspicion that he has engaged in, or is about to engage in criminal conduct. Royer, 460 U.S. at 498, 103 S.Ct. at 1324, 75 L.Ed.2d at 236. In Florida v. Rodriquez, ___U.S.___, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984), the court noted that the defendant's strange behavior including attempts to get away, and his

companions' contradictory statements about their identity provided the articulable suspicion necessary to justify a brief detention and seizure. Id. at ___, 105 S.Ct. at 311, 83 L.Ed.2d at 171. Similarly, in Royer, supra, the court concluded that the fact the defendant was traveling under an assumed name, in addition to his behavior and appearance, which fit the drug courier's profile, was sufficient to suspect him of carrying drugs and to detain him for the purpose of investigating that suspicion. Royer, 460 U.S. at 502, 103 S.Ct. at 1326, 75 L.Ed.2d at 239. The detention in Royer, however, exceeded the limits permissible under Terry because the agents failed to return Royer's airline ticket and identification. Instead, they seized his luggage and led him into a room for questioning, thus making it

clear that he was not free to leave.

More recently, the Florida Supreme Court concluded that narcotics agents had an articulable suspicion to detain a suspect for questioning pursuant to Terry after they had found cocaine on his companion's person. Jacobson v. State, 476 So.2d 1282, 1287 (Fla. 1985). Rodriguez, Royer, and Jacobson, supra, were all airport stop cases in which narcotics agents initially approached the defendants because they fit within a drug courier's profile.

In the present case, the agents discovered that Nease was traveling under an assumed name in the course of a consensual encounter. This, as well as the surrounding facts including his nervousness and the fact that he fit within the profile, gave rise to an articulable

suspicion that he was carrying drugs. At all times prior to this, Nease had been free to leave because the agents had returned his ticket to him. He agreed, however, to have his luggage searched. Before any further questioning could take place, Nease fled from the agents, leaving his luggage behind.

Nease's running constitutes a non-verbal withdrawal of consent to search his luggage. See, e.g., Jacobson, supra. However, because a founded suspicion had developed at this point, the agents no longer needed to rely on Nease's consent to detain him under a Terry stop. Consequently, the agents were justified in pursuing Nease for further questioning. The struggle that followed when they caught him would have been sufficient to justify his arrest for interfering with

with an officer in the performance of his legal duty. §843.02, Fla.Stat. (1985). See, e.g., Jacobson, 476 So.2d at 1287.

We conclude that for all practical purposes Nease was under arrest at this time. The methaqualone found in his possession, therefore, was admissible because it was obtained in a search pursuant to a lawful arrest. We reach a different conclusion, however, with regard to the cocaine found in Nease's suitcase.

Because we conclude that by running Nease effectively withdrew his consent to a search of his luggage, a warrantless search of those bags was improper. The Fourth Amendment protects an owner's expectation of privacy in the contents of a closed container. United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53

L.Ed.2d 538 (1977). In Chadwick, the court concluded that a warrant was necessary to search a locked footlocker seized contemporaneously with the defendant's arrest, despite the fact that the police had probable cause to believe it contained marijuana. The court stated:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer incident of the arrest.

433 U.S. at 15, 97 S.Ct. at 2485, 53 L. Ed.2d at 51.

In the present case, the agents had only an articulable suspicion that Nease's bags might contain drugs. Under the

circumstances, the government's interest in stemming illicit drug trade justified only a minimal intrusion into Nease's personal effects. See United States v. Place, 462 U.S. at 462 U.S. at 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1982); Terry v. Ohio, supra. This could have been accomplished by a brief detention of the luggage in order to subject it to a canine sniff test. Cf. Place, supra. The warrantless search of the luggage, without Nease's consent, led to evidence obtained in violation of his Fourth Amendment rights. The trial court erred in denying Nease's motion to suppress. Accordingly, we reverse the judgment of conviction for trafficking in cocaine.

AFFIRMED IN PART AND REVERSED IN PART.

DOWNEY, WALDEN, JJ., AND HURLEY, DANIEL T.K., Associate Judge, concur.

IN THE DISTRICT COURT OF APPEAL OF

THE STATE OF FLORIDA

JEFFREY NEASE a/k/a
MICHAEL COLWELL a/k/a
LOUIS POYNTER

Appellant(s),

v. CASE NO. 82-2164

STATE OF FLORIDA,

Appellee(s).

April 9, 1986

BY ORDER OF THE COURT:

ORDERED that Appellee's March 18, 1986 Motion for Rehearing is denied.

I hereby certify the foregoing is a true copy of the orginal court order.

/S/ Clyde L. Heath
CLYDE L. HEATH,
CLERK

cc: Georgina Jimenez-Orosa,
Ass't. Attorney General

Stephen J. Finta, Attorney

cms

SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 10, 1986

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 68,729

JEFFREY NEASE a/k/a MICHAEL COLWELL a/k/a LOUIS POYNTER, District Court of Appeal, Fourth District No.82-2164

Respondent,

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON,

EHRLICK and SHAW, J.J., concur

A True Copy

TEST:

Sid J. White
Clerk
Supreme
Court

cc: Hon. Clyde L. Heath,Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Patricia Cocalis, Judge
Georgina Jimenez-Orosa, Esquire
Stephen J. Finta, Esquire

By: /S/ Betsy Hill

Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FRIDAY, SEPTEMBER 26, 1986

STATE OF FLORIDA,	**	
Petitioner,	**	CASE NO. 68,729
v.	**	District Court of Appeal, 4th
JEFFREY NEASE a/k/a MICHAEL COLWELL a/k/a LOUIS POYNTER,	**	District - No. 82-2164
Respondent.	**	

The motin for stay pending review filed by petitioner is granted and the proceedings in this Court, the District Court of Appeal, Fourth District, and the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, are hereby stayed pending review by the Supreme Court of the United States.

A True Copy
TEST:

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk

Sid J. White
Clerk Supreme Court

Hon. Patricia Cocalis, Judge

Georgina Jimenez-Orosa, Esquire
Stephen T. Finta, Esquire

By: /S/ Dulilue Causseaux
Chief Deputy

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

CASE NUMBER: 86-758

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF FLORIDA

PETITIONER,

VS.

JEFFREY NEASE A/K/A MICHAEL COLWELL A/K/A LOUIS POYNTER,

RESPONDENT.

RECEIVED
JAN 29 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION AND AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW THE RESPONDENT, MICHAEL COLWELL, BY AND THROUGH UNDERSIGNED COUNSEL, WHO MOVES THIS HONORABLE COURT TO ENTER AN ORDER PERMITTING THE RESPONDENT LEAVE TO PROCEED IN FORMA PAUPERIS BEFORE THIS HONORABLE COURT. AS GROUNDS, THE RESPONDENT, THE DEFENDANT BELOW, WOULD SHOW AS FOLLOWS:

1. THAT THIS IS THE SECOND TIME THAT THE DEFENDANT HAS BEEN PUT TO THE TERRIBLE EXPENSE OF PROCEEDING THROUGH THE ENTIRE APPELLATE COURT OF THE STATE OF FLORIDA, AND BEFORE THIS HONORABLE COURT.

2. THE LEAVE TO APPEAR IN FORMA PAUPERIS HAS NOT BEEN SOUGHT ON BEHALF OF THE RESPONDENT IN ANY LOWER COURT PROCEEDING.

3. That because of a back injury, suffered a long time ago in Ohio, which is the subject of workman's compensation, the Defendant has not been able to be substantially gainfully employed in some sort of an occupation that would allow him to pay his attorney the substantial fees that have accrued during the last five years.

4. That the Respondent has not been able to pay his counsel fees since these matters became subject to appellate review in the year of 1982.

5. That the Petitioner has been through the judicial court system, including the appellate courts and The Supreme Court of Florida, three times at this particular juncture, and has cavalierly moved to have the instant case reconsidered a second time.

6. That the Respondent does not have money with which to pay counsel and would represent to this Court that at this present time, he can avail himself of no funds, either from his family, friends or earnings, with which to pay counsel either the substantial funds of appellate fees that are currently due and owing, nor the amount of money required for representation before this Court.

7. The Respondent would further state that he has not disposed of any assets for financial gain within

THE PERIOD OF THE LAST YEAR, AND CURRENTLY DOES NOT HAVE ANY ASSETS OF ANY SORT IN HIS POSSESSION OR IN THE POSSESSION OF ANY THIRD PARTIES.

8. THAT WERE IT NOT FOR THE FACT THAT THE RESPONDENT'S COUNSEL WAS PAID FOR THE INITIAL MATTERS IN THIS CASE AND IN THE COMPANION CASES, AND WERE IT NOT FOR THE CONCERN THAT HIS COUNSEL HAS FOR THE DEFENDANT THAT THESE MATTERS BE RESOLVED IN A PROPER FASHION, THE RESPONDENT WOULD CURRENTLY STAND BEFORE THIS COURT WITHOUT REPRESENTATION OF ANY SORT.

9. THAT THE RESPONDENT'S COUNSEL HAS NOT RECEIVED ANY MONEY FROM EITHER FRIENDS OR FAMILY ON THE RESPONDENT'S BEHALF DURING THE PERIOD OF THE LAST FIVE YEARS, WHILE THE RESPONDENT'S CASES HAVE BEEN PROCEEDED THROUGH THE APPELLANT SYSTEM IN THE STATE OF FLORIDA AND BEFORE THIS COURT, BOTH NOW AND AT AN EARLIER TIME.

10. THAT UPON A CONSIDERATION OF ALL OF THESE MATTERS, THE RESPONDENT WOULD REQUEST THIS COURT TO ENTER AN ORDER PERMITTING THE RESPONDENT, THROUGH HIS COUNSEL, TO PROCEED IN FORMA PAUPERIS, BEFORE THIS COURT, SUBJECT TO SUCH CONDITIONS THAT THIS COURT MAY DEEM FIT AND PROPER.

WHEREFORE, THE RESPONDENT, MICHAEL COLWELL, MOVES THIS COURT THAT THE ABOVE-REQUESTED RELIEF ISSUE INSTANTER.

STATE OF FLORIDA
COUNTY OF BROWARD

BEFORE ME, THE UNDERSIGNED AUTHORITY, THIS DAY PERSONALLY APPEARED STEPHEN J. FINTA, WELL KNOWN TO ME TO BE THE PERSON WHO, AFTER BEING DULY SWORN, STATES THAT THE ABOVE REPRESENTATIONS ARE TRUE AND CORRECT, AND THAT HE IS EXECUTING THE FOREGOING ON BEHALF OF THE RESPONDENT DUE TO THE UNAVAILABILITY OF THE RESPONDENT.

STEPHEN J. FINTA

SWORN TO AND SUBSCRIBED BEFORE ME THIS 28th DAY OF JANUARY, 1987.

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES APR. 24 1989
BONDED THROUGH NOTARY PUBLIC UNDERWRITERS, INC.

NOTARY PUBLIC

My Commission Expires:

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING AS FURNISHED, BY MAIL, TO JOY B. SHEARER, ESQUIRE, ASSISTANT ATTORNEY GENERAL, 111 GEORGIA AVENUE, SUITE 204, WEST PALM BEACH, FLORIDA 33401 THIS 28th DAY OF JANUARY, 1987.

RESPECTFULLY SUBMITTED,

STEPHEN J. FINTA, ESQUIRE
3015 NORTH OCEAN BOULEVARD, #122
FORT LAUDERDALE, FLORIDA 33308
(305) 537-5565
(305) 945-2353--DADE

BY:

CASE NUMBER: 86-758

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF FLORIDA
PETITIONER,
VS.
JEFFREY NEASE A/K/A MICHAEL COLWELL
A/K/A LOUIS POYNTER,
RESPONDENT.

NOTICE OF APPEARANCE OF COUNSEL

THE CLERK WILL PLEASE ENTER MY APPEARANCE AS COUNSEL FOR JEFFREY NEASE A/K/A MICHAEL COLWELL A/K/A LOUIS POYNTER, WHO IN THIS COURT IS THE RESPONDENT.

I CERTIFY THAT I AM A MEMBER OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES.

RESPECTFULLY SUBMITTED,

STEPHEN J. FINTA, ESQUIRE
3015 NORTH OCEAN BOULEVARD, #122
FORT LAUDERDALE, FLORIDA 33308
(305) 537-2565
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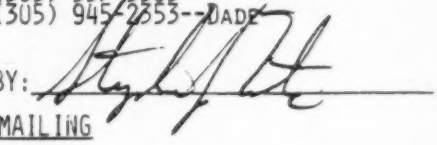
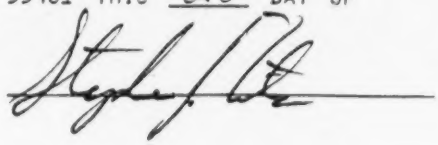
BY: 

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING

WAS FURNISHED, BY U.S. MAIL, TO JOY B. SHEARER, ESQUIRE, ASSISTANT ATTORNEY GENERAL, 111 GEORGIA AVENUE, SUITE 204, WEST PALM BEACH, FLORIDA 33401 THIS 28th DAY OF JANUARY, 1987.



CASE NUMBER: 86-758

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF FLORIDA,
PETITIONER,
VS.
JEFFREY NEASE A/K/A MICHAEL COLWELL
A/K/A LOUIS POYNTER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE STATE DISTRICT COURT OF APPEALS,
FOURTH DISTRICT, IN THE STATE OF FLORIDA
RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN J. FINTA, ESQUIRE
COUNSEL TO THE RESPONDENT
SUITE 122
3015 NORTH OCEAN BOULEVARD
FORT LAUDERDALE, FLORIDA 33308
TELEPHONE: (305) 537-5565

QUESTIONS PRESENTED

I.

WHETHER THE FOURTH DISTRICT COURT OF APPEALS INCORRECTLY HELD THAT THE DEFENDANT'S RUNNING AWAY WHEN THE SEARCH OF HIS LUGGAGE WAS ABOUT TO BEGIN WAS A WITHDRAWAL OF THE CONSENT TO SEARCH AS OPPOSED TO AN ABANDONMENT OF HIS LUGGAGE?

II.

WHETHER WHEN A TRAVELER IS SUBJECTED TO A LAWFUL CUSTODIAL ARREST AT A CONGESTED AIRPORT TERMINAL CONCOURSE, DOES THE CONSTITUTIONAL PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO HIS LAWFUL ARREST INCLUDE THE LUGGAGE WHICH HAS BEEN CONTEMPORANEOUSLY SECURED BY THE OFFICERS?

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OPINIONS BELOW

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA IS REPORTED AT 484 So.2D 67 (FLA. 4TH D.C.A. 1986).

JURISDICTION

JURISDICTION IS SOUGHT PURSUANT TO 28 U.S.C. §1257(3).

FEDERAL CONSTITUTIONAL PROVISIONS INVOKED

THE RESPONDENT WOULD ACCEPT THE PETITIONER'S VERSION OF THE CONSTITUTIONAL PROVISION AT ISSUE.

STATEMENT OF THE CASE

THE RESPONDENT ACCEPTS THE PETITIONER'S VERSION OF THE FACTS IN THIS CASE WITH THREE VERY IMPORTANT DIFFERENCES. AFTER NOTING THE DISCREPANCY IN NAMES BETWEEN THE RESPONDENT'S AIRPLANE TICKET AND HIS PERSONAL IDENTIFICATION, THE OFFICERS THEN REIDENTIFIED THEMSELVES AS NARCOTICS OFFICERS AND ASKED THE RESPONDENT TO ACCOMPANY THEM TO A REMOTE SMALL STORAGE AREA TO BE SEARCHED. THE OFFICERS THEN CALLED OUT THE BAGGAGE CHECK NUMBERS TO OTHER OFFICERS TO GRAB THE RESPONDENT'S LUGGAGE. IT SPECIFICALLY BEARS NOTE THAT THE RESPONDENT'S CONSENT TO SEARCH, AFTER BEING ASKED TO GO TO THE REMOTE AREA WAS A CONSENT TO SEARCH THE RESPONDENT'S HAND BAGGAGE ONLY.

LASTLY, ONE OF THE ARRESTING OFFICERS, AGENT DECOURSEY, STATED THAT HE DID NOT TELL THE RESPONDENT THAT HE WAS FREE TO GO, AND FREE TO REFUSE HAVING HIS LUGGAGE SEARCHED. MR. DECOURSEY'S SOLE JUSTIFICATION FOR ARRESTING THE RESPONDENT AS HE RAN AWAY FROM THE PLANNED SEARCH WAS THE FACT THAT HE RAN AWAY, VIEWED IN CON-

JUNCTION WITH HIS ALLEGED NERVOUSNESS AND THE DIFFERENCE IN NAMES BETWEEN Mr. COLWELL'S AIRPLANE TICKET AND HIS PERSONAL IDENTIFICATION.

THE RESPONDENT'S REASONS FOR NOT GRANTING THE WRIT

THIS COURT HAS HAD THE OPPORTUNITY TO REVIEW A CASE HAVING A REMARKABLE FACTUAL SIMILARITY TO THIS CASE, IN THE CASE OF REID V. GEORGIA, 448 U.S. 438 (1980). IF THE COURT'S REASONING HAD BEEN MORE CLEARLY ARTICULATED IN REID, SUPRA, THE PETITIONER'S ARGUMENT WOULD PROBABLY BE UNAVAILABLE TO THEM IN THIS CASE*! IT IS SUBMITTED, HOWEVER, THAT THE PETITIONER'S AREA OF FOCUS PLACES THE CART BEFORE THE HORSE. IN SCRUTINIZING THE EXACT MOMENT WHEN A TRANSGRESSION OF AN INDIVIDUAL'S FOURTH AMENDMENT RIGHTS TAKES PLACE, IT IS NECESSARY THAT THE TYPE OF STOP BE CAREFULLY GLEANED FROM THE FACTS. THE DISTRICT COURT OF APPEALS FOUND THAT THIS CASE STARTED OUT AS A CONSENSUAL CITIZEN-POLICE ENCOUNTER. IT IS PRECISELY AT THAT POINT, THAT IT ERRED IN THE MOST RECENT DECISION, BY FAILING TO CONSIDER THE CLEAR IMPORT OF CONSTITUTIONAL FACTS. SPECIFICALLY, WHEN THE POLICE OFFICER REIDENTIFIED THEMSELVES AND ASKED THE RESPONDENT TO ACCOMPANY THEM TO A REMOTE AREA TO HAVE HIS PERSONAL HAND BAGGAGE SEARCHED, WELL ARTICULATED PRECEDENT IN THE ELEVENTH AND IN THE FIFTH CIRCUITS MANDATED THAT JUDICIAL OPINION BE RESOLVED

---

* IT BEARS NOTE THAT EVEN IF THIS CASE WAS REVERSED IN FAVOR OF THE PETITIONER, THAT WOULD NOT END THE MATTER. IN A CONTEMPORANEOUS COMPANION CASE, POYNTER V. STATE, 443 So.2D 219 (4TH D.C.A. 1983) THE SAME FOURTH DISTRICT COURT OF APPEALS IN THE STATE OF FLORIDA RULED THAT THE RESPONDENT WAS INCOMPETENT TO STAND TRIAL. BECAUSE THE RESPONDENT WAS NEVER READJUDICATED COMPETENT IN THIS CASE, AND BECAUSE OF COLLATERAL ESTOPPEL, NOTHING WOULD CHANGE IN THIS CASE.

TO PRESUME THE RESPONDENT WAS UNDER ARREST FOR PURPOSES OF THE FOURTH AMENDMENT.

IN UNITED STATES V. ELSOFFER, 671 F.2D 1294 (11TH CIR. 1982), THE ELEVENTH CIRCUIT FOUND HAT THE RETENTION OF A SUSPECTS TICKET STRONGLY SUGGESTED HE WAS UNDER ARREST. CONTINUING ON, THE COURT STATED AS FOLLOWS:

> . . . OUR HOLDING WOULD NOT DIFFER . . . EVEN IF THE RECORD WAS CLEAR IN SHOWING THAT THE AGENTS HAD RETURNED ELSOFFER'S DOCUMENTS BEFORE ASKING HIM WHETHER HE WOULD CONSENT TO A SEARCH OR GO TO A LOUNGE. WE DO NOT BELIEVE THAT AFTER A RETURN OF THE DOCUMENTS RETAINED DURING INTERROGATION, FOLLOWED BY REQUESTS TO CONSENT TO A SEARCH AND GO TO AN OFFICE, AN INDIVIDUAL WOULD FEEL THAT HIS DETENTION HAD ENDED.
> 671 F.2D AT 1298 N.7

ALSO IN ACCORD, SEE UNITED STATES V. WAKSAL, 709 F.2D 653 (11TH CIR. 1983).

IN UNITED STATES V. BERRY, 670 F.2D 583 (5TH CIR. 1982), THE COURT STATED AS FOLLOWS:

> WE DO NOT WISH TO SHACKLE POLICE ABSOLUTELY TO A RIGID AND AWKWARD RULE REQUIRING THEM TO INFORM INDIVIDUALS THAT THEY ARE FREE TO NOT ACCOMPANY POLICE TO AN OFFICE, BUT WE DO BELIEVE THAT ONLY EXCEPTIONALLY CLEAR EVIDENCE OF CONSENT SHOULD OVERCOME A PRESUMPTION THAT A PERSON REQUESTED TO ACCOMPANY AN AGENT TO AN OFFICE NO LONGER WOULD FEEL FREE TO LEAVE. SUCH A REQUEST COMBINES A SUBSTANTIAL INTRUSION ON AN INDIVIDUAL'S FREEDOM, A MARKED INCREASE IN THE COERCIVE NATURE OF THE ENVIRONMENT IN WHICH THE INDIVIDUAL WILL BE RESPONDING TO POLICE, AND SUBSTANTIAL PSYCHOLOGICAL COERCION FROM THE INTIMATION THAT THERE IS STRONG SUSPICION THAT AN INDIVIDUAL IN INVOLVED IN CRIMINAL CONDUCT . . .

EVEN VERBAL AGREEMENT TO ACCOMPANY AN OFFICER SHOULD BE SCRUTINIZED EXCEPTIONALLY CLOSELY TO ENSURE A COMPLETE ABSENCE OF COERCIVE INFLUENCE. 670 F.2D 598

BASED UPON UNEQUIVOCAL PRECEDENT, THE RESPONDENT WAS UNDER ARREST WHEN THE POLICE REIDENTIFIED THEMSELVES AND ASKED HIM TO ACCOMPANY THEM TO A REMOTE WAREHOUSE TO BE SEARCHED. THESE FACTS, UNDISPUTED AS THEY ARE, CONSTITUTE THE FOCAL POINT OF ANALYSIS IN THIS CASE. NOT ONLY WAS THE RESPONDENT UNDER ARREST IMPROPERLY WITHOUT PROBABLE CAUSE, BUT ANY CONSENT TO SEARCH GIVEN BY HIM WAS IRREPARABLY TAINTED BY THE IMPROPER STOP. SEE BROWN V. ILLINOIS, 442 U.S. 590 (1975); DUNAWAY V. NEW YORK, 442 U.S. 200 (1979). ADDITIONALLY, THE CONSENT TO SEARCH, UNATTENUATED FROM THE ILLEGAL STOP, WAS ALSO NOT EXCEPTIONALLY CLEAR. UNITED STATES V. BERRY, SUPRA.

UNDER THE CIRCUMSTANCES OF THIS CASE, THE DECISION FIRST REACHED BY THE STATE DISTRICT COURT OF APPEALS WAS THE APPROPRIATE DECISION, BUT FOR THE WRONGLY ARTICULATED REASONS. THE DECISION LAST REACHED BY THE STATE DISTRICT COURT OF APPEALS WAS CORRECT AS IT RELATED TO THE SUPPRESSION OF THE COCAINE FROM THE RESPONDENT'S LUGGAGE, BUT INCORRECT AS IT RELATES TO THE METHAQUALONE FOUND ON THE RESPONDENT'S PERSON. MR. COLWELL WAS ILLEGALLY ARRESTED. EVERYTHING THAT HAPPENED THEREAFTER WAS IMPROPER, UNDER THE CIRCUMSTANCES OF THE CASE AND THE SEARCH AND SEIZURE OF THE RESPONDENT AND HIS LUGGAGE. NOT ONLY DOES THE ILLEGAL ARREST UNDER THE FOURTH AMENDMENT TAINT ANY SUBSEQUENT CONSENT*, BUT THE ILLEGAL ARREST

*THERE IS A QUESTION AS TO THE SCOPE OF THE CONSENT, SINCE THE AGENT THAT SPOKE TO COLWELL ASKED FOR HIS CONSENT TO SEARCH HIS HAND LUGGAGE.

ALSO CREATES IMPROPER FIFTH AMENDMENT TAINT, BECAUSE HE WAS NEVER GIVEN HIS MIRANDA WARNINGS WHEN HE WAS IMPROPERLY ARRESTED. ASKING HIM ABOUT HIS LUGGAGE UNDER CIRCUMSTANCES WHERE HE WAS ALREADY UNDER ARREST, PLACED BEFORE HIM THE CHOICE OF CONSENTING, ABANDONING OR INCRIMINATING HIMSELF. RHODE ISLAND V. INNIS, 446 U.S. 291 (1980).

THIS CASE WAS VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF FLORIDA V. RODRIGUEZ, 469 U.S. 1 (1984). A JUSTICE STEVENS LAMENTED IN HIS DISSENT IN RODRIGUEZ, SUPRA, IT IS HIGHLY UNUSUAL FOR THIS COURT TO UNDERTAKE DE NOVO REVIEW OF FACTUAL FINDINGS OF A STATE COURT ON THE ARTICULABLE SUSPICION ISSUE. IN VACATING THE STATE DISTRICT COURT'S DECISION LAST TIME, THE COURT STOPPED SHORT OF A DE NOVO FACTUAL HEARING. THE ONLY QUESTION WAS THE APPROPRIATE STANDARD BEING APPLIED. THE STATE COURT OF APPEALS HAS BEEN CONFUSED BY THE COURT'S ORDER VACATING AND REMANDING THE CASE. HOWEVER, THE CLEAR PRECEDENT APPLICABLE IN THE ELEVENTH AND FIFTH CIRCUITS LEAVES NO DOUBT AS TO THE EFFICACY OF THE FIRST DECISION. NEASE V. STATE, 442 So.2D 325 (4TH D.C.A. 1983). TO THE EXTENT THAT THE STATE COURT OF APPEALS, ON REMAND FROM THIS COURT, FAILED TO SUPPRESS EVERYTHING, IT WAS IN ERROR IN THE SCOPE OF ANALYSIS. HOWEVER, THE RESPONDENT DOES NOT TAKE ISSUE WITH THE FAILURE OF THE STATE COURT OF APPEALS TO SUPPRESS THE METHAQUALONE, SINCE IT WAS NOT RAISED BEFORE THE FLORIDA SUPREME COURT BY THE RESPONDENT.

LASTLY, THE RESPONDENT WOULD SUBMIT THAT THE PETITIONER HAS ARTFULLY AVOIDED A PROPER FOURTH AMENDMENT ANALYSIS AND HAS RAISED ISSUES THAT COULD HAVE BEEN AND SHOULD HAVE BEEN RAISED IN THE STATE'S FIRST REQUEST FOR REVIEW IN THIS COURT; FOR INSTANCE THE ISSUE OF CONSENT AND ABANDONMENT. HERE, THE ISSUE OF REVOCATION OF CONSENT

TO SEARCH AS ARTICULATED IN Hease v. State, 484 So.2d 67 (Fla. 4th D.C.A. 1986) and Jacobson v. State, 476 So.2d 1282 (Fla. 1983) is a state issue, the resolution of which adequately decides this case, and should serve as an alternate basis to deny review in this Court. Michigan v. Long, 463 U.S. 1032 (1983).

CONCLUSION

Certiorari should be denied for the reasons set forth herein. The arresting agent agreed that he only tackled Mr. Colwell because of him allegedly fitting the profile and because he ran away, thereby revoking his consent as matter of State of Florida law.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing was furnished, by U.S. Mail, to Joy B. Shearer, Esquire, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401 this 28th day of January, 1987.

Respectfully submitted,

STEPHEN J. FINTA, ESQUIRE
3015 North Ocean Boulevard, #122
Fort Lauderdale, Florida 33308
(305) 537-5565
(305) 945-2353--Page

BY: _____